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IN THE

Supreme Court of the United States

No. 506

OCTOBER TERM, 1956

IN RE: GEORGE E. ADDISON, *Appellant.*

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

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ARGUMENT

The appellee's motion to dismiss the appeal is based on two grounds: (1) that the alleged federal questions were not timely or properly raised or passed upon by the Pennsylvania Supreme Court, and (2) that there are no substantial federal questions sought to be reviewed.

In support of its first contention, appellee quotes from the opinion of the Pennsylvania Supreme Court (page 4, appellee's motion to dismiss appeal) as indicating the sole questions presented to that court. But it must be remembered that the appellee in this court was the appellant in the Pennsylvania Supreme Court. It could and did choose the grounds for its appeal. But as Justice Jones pointed out in the quoted section, the issues raised in the appeal

to the Pennsylvania Supreme Court in the instant case were "the *principal* reasons assigned for the conclusions arrived at in Connolly case." It did not exclude the *other reasons* assigned by the Court of Common Pleas for its decision in the *Connolly case* and made part of its decision in the instant case. These other reasons were: (1) the violation of due process of law (page 33, Jurisdictional Statement), (2) the impairment of the obligation of contract in contravention of the Federal Constitution (page 33, Jurisdictional Statement) and (3) the arbitrary and illegal action of the Civil Service Commission in its findings (pages 44, 45, 46, Jurisdictional Statement).

These reasons are an integral part of the record in this case. The fact that the appellee did not choose to appeal on those grounds should not deprive appellant from raising those other issues on appeal.

The Court of Common Pleas considered the question of the abuse of discretion by the Civil Service Commission amounting to caprice (pages 44, 45, 46, Jurisdictional Statement) because the Commission acted "without presentment of substantial evidence." The question of caprice was first raised by the appellant in his exception to the adjudication of the Civil Service Commission (see Appendix C), p. 11, infra).

What the Court said in *Bennett v. Dulles*, 117 F. Supp. 454, 456 (1954), an action involving the discharge of an employee from her civil service position in the State Department, is appropriate here. Said the Court: "There is no showing of arbitrary or capricious conduct and no statutory or constitutional rights are involved. Under these circumstances, the jurisdiction of the court comes to an

end, for 'it is fully established that if the prescribed procedure, if any, is followed *and no constitutional or statutory right is denied,* (Emphasis added) action of executive officers in discharging employees is not subject to revision in the courts' . . .".

In the instant case, there are statutory and constitutional rights involved. There is also a strong showing of arbitrary and capricious conduct on the part of the Civil Service Commission in its findings. This warrants review by the court. To hold otherwise would give the Civil Service Commission unprecedented and dictatorial powers not contemplated by the Philadelphia Home Rule Charter, contrary to the express provisions of the Act of 1951 by the State Legislature and violative of the federal constitutional rights of the appellant.

The appellee asserts (page 5, motion to dismiss appeal) that the Pennsylvania Supreme Court does not allow constitutional questions to be raised for the first time after the state's highest court has rendered its decision. The appellee cites two cases in support of this proposition, *Sherwood v. Elgart*, 383 Pa. 110 (1955) and *In re: Dorrance's Estate*, 172 A. 900 (Pa. Supreme Ct. 1933). However, an examination of the *Sherwood case* reveals that the Pennsylvania Supreme Court held just the opposite of what the appellee contends, saying (page 114):

> "In a supplemental brief filed prior to the reargument of these appeals, the appellees contend for the first time that the Act of 1913 is unconstitutional in that it violates Article I, §11 and Article III, §21 of the Constitution. Appellants contend this question cannot now be raised because of the general rule laid

> down in Montgomery County Bar Association v. Rinalducci, 329 Pa. 296, 298, 197 A. 924 and Smith v. Yellow Cab Co., 288 Pa. 85, 135 A. 858: ". . . matters not raised in, or considered by, the court below cannot be invoked on appeal even though they involve constitutional questions.' That is not applicable because it applies only to appellants. The rule here applicable is that a correct decision will be sustained if it can be sustained for any reason whatsoever; in other words, we will not reverse in such a case even though the reason given by the court below to sustain its decision was erroneous: Derry Council, No. 40 v. State Council, 197 Pa. 413, 42; Com. to use v. Wing, 253 Pa. 226, 230; Corgan v. Geo. F. Lee Coal Co., 218 Pa. 386, 392; Brew v. Hastings, 206 Pa. 155, 162; 2 R. C. L. 189; State H. for C.I. v. Consolidated W. S. Co., 267 Pa. 29, 39. It follows that the appellees may properly contend at this time that the Act of 1913 is unconstitutional. However, after considering appellees' contention we find it to be without merit."

In the *Dorrance Estate*, the court refused to consider a federal question first raised on appeal but gave the following reason:

> "As no federal question was involved or presented by the record or briefs or in the oral argument for consideration in the decision of the basic matter of fact, none was considered or decided and none remains for decision."

But in the instant case, the record clearly shows the federal questions in both the original record, Judge Davis' opinions and the petition for reconsideration.

The appellee further cites decisions in this court (page 6, motion to dismiss appeal) for the proposition that an appeal cannot be sustained where the federal questions were first made in the state appellate court in a petition for rehearing. However, an examination of these cases does not indicate any support for this proposition. In *McGarrity v. Delaware River Bridge Commission*, 292 U. S. 19 (1934), one of the cases cited, the court said as follows:

> "No federal question was raised prior to a petition for rehearing in the Supreme Court of the state, which was denied without more. Appellant insists that questions under the Fourteenth Amendment were thus raised at the first opportunity. The petition for rehearing does not appear in the record. No does the record contain the pleadings, the evidence, or any findings by the State Court upon the questions of fact involved. Appellant relies upon statements in the opinion of the State Court but these fail to support appellant's contentions."

This case obviously does not apply.

In *Radio Station WOW v. Johnson*, 326 U. S. 128, also cited by the appellee, the court held that the federal question had not only been eliminated by the pleadings but also denied the federal question on its merits. This case likewise is inapplicable.

In *American Surety Company v. Baldwin*, 287 U. S. 156 and 163, the same ground first presented to the state court as a matter of state law was subsequently presented as a matter of federal law. The court held that there had

been ample opportunity to present the question as a matter of federal law, saying further:

> "This is not a case where, as in Saunders v. Shaw, 244 U. S. 317, 320, the federal claim arose from an unanticipated disposition of the case at the close of the proceedings in the state Supreme Court . . . nor is the federal claim based . . . upon the unanticipated act of the state Supreme Court in giving to a statute a new construction which threatened rights under the Constitution."

In the instant case, there is ample support in the record of the federal questions asserted. Further, this Court's decision in *Slochower v. Board of Education of the City of New York*, 350 U. S. 551 (1956), was generally unanticipated.

Levine v. Farley, 107 F. 2d 186, cited by the appellee as indicating the federal restriction on the scope of judicial review is inapplicable to the instant case. In the *Levine case* there was no statutory conflict involved and there was no allegation of the violation of constitutional rights or of arbitrary and capricious conduct.

Dodge v. Board of Education, 302 U. S. 74, 78 (1937), cited by the appellee as authority for the scope of review effected by the Philadelphia Home Rule Charter is inapplicable. The *Dodge case* involved a decrease of annuity payments to retired teachers in the public schools of Chicago. The contention was made that the teachers had vested rights in annuities and that a contract had been created when the teachers remained in the service after passage of the Act. The court properly held that there was no im-

pairment of any contract since no contract had been created. It was held that the annuity payments were in effect pensions or gratuities involving no agreement of the parties and subject to modification or abolition at the pleasure of the legislature. This case is therefore inapplicable to the instant case because the appellee does not question that a contract between the appellant and the City as a policeman existed.

Recognizing this fact, the appellee argues that the change effected by the Philadelphia Home Rule Charter in restricting review to procedural questions only was a minor change only and that appellant has no constitutional right to a particular form of remedy. The cases cited by the appellant in support of this argument, *Higginbothom vs. Baton Rouge*, 306 U. S. 535 (1938), *Neblett v. Carpenter*, 305 U. S. 297 (1939), *Richmond Mortgage and Loan Corporation v. Wachovia Bank and Trust Co.*, 300 U. S. 124 (1937), are inapplicable. The *Higginbothom case* involved employment at the discretion of a city council who could appoint and remove at will. In the *Neblett case*, petitioners unsuccessfully claimed in the Supreme Court that the method of liquidation adopted by an Insurance Commissioner and approved by the Court denied them due process and impaired the obligation of their policy contracts. While saying in so many words that the petitioners had "no constitutional right to a particular form of remedy", the court also said the following:

> "They are not entitled, as against their fellows who prefer to come under the plan and accept its benefits, to force at their own wish and whim, a liquidation which under the findings will not advantage them and

may seriously injure those who accept the benefit of the plan. They are not bound, as were the dissenting creditors in Doty v. Love, 295 U. S. 64, to accept the application of the new company but are afforded an alternative whereby they will receive damages for breach of their contracts. They have failed to show that the plan takes their property without due process. "It is not contended that a statutory scheme for the liquidation of an insolvent domestic corporation is per se an impairment of the application of the company's contracts. The argument is that the impairment of contract arises from the less favorable terms and conditions of the new noncancelable policies which are to be substituted for the old ones and, in the case of the life policies, by the substitution of a new company as contractor in place of the old, without the consent of the policy-holder. This position is bottomed upon the theory that the policy-holders are compelled to accept the new company as insurer on the terms set out in the rehabilitation agreement. As has been pointed out they are not so compelled and are given the option of a liquidation which on this record appears as favorable to them as that which would result from the sale of the assets and pro rata distribution in solution of all resulting claims for breach of outstanding policies."

The appellee has, therefore, quoted the phraseology of the Court out of context.

With respect to the effect of the *Slochower case*, the appellee quotes appellant's then counsel as stating to the Civil Service Commission that he advised the appellant of his rights and that appellant wanted to testify (page 10,

motion to dismiss appeal). The statement of counsel must be taken in the light of the prevailing view as to the effectiveness of the provision of the Home Rule Charter restricting the scope of review and by the threat of dismissal for the exercise of appellant's right to claim the privilege of the Fifth Amendment as is set forth in the record. It must also be remembered that this occurred prior to the decision of this Court in the *Slochower case*. Counsel appeared to have no alternative.

The decision of the Civil Service Commission was based on pure suspicion and had no bearing on appellant's conduct as a city policeman. The Commission's findings amounted to arbitrary and capricious conduct such as to warrant review by a court of competent jurisdiction. *Bennett v. Dulles*, supra.

Finally, the cases of *Garner v. Board of Public Works of Los Angeles*, 341 U. S. 716 (1951) and *Adler v. Board of Education of the City of New York*, 342 U. S. 485 (1952) cited by the appellee on page 11 of its motion to dismiss appeal, are inapplicable. In the first place, these cases involved membership in subversive organizations, proof of which was sufficient to disqualify the parties involved from their teaching posts. Secondly, full judicial review was provided in the cases in question which, of course, is not the case with the provision in the Philadelphia Home Rule Charter as interpreted by the Pennsylvania Supreme Court.

Appellant does not question the right of the Commission to inquire into the fitness of the appellant to continue and remain in municipal employment. Appellant, however, is entitled to a fair hearing and not one where his basic

constitutional rights are flagrantly ignored in a capricious and arbitrary manner. Appellant is also entitled to the protection of his contract with the City as a police officer so that his employment should not be subject to the whim and caprice of a superior official. These rights apply to all city employees of the City of Philadelphia and not merely to the appellant.

The appellant has adequately shown that substantial federal questions exist and were timely raised. None of the cases cited by the appellee support its contentions to the contrary.

WHEREFORE, appellant urges this Court to deny the motion to dismiss the appeal.

Respectfully submitted,

J. J. KILIMNIK,
Attorney for Appellant.

APPENDIX "C"

EXCEPTIONS TO ADJUDICATION

George E. Addison, appellant, hereby assigns the following exceptions to the adjudication of the Civil Service Commission rendered in the above entitled matter:

1. The Civil Service Commission (hereinafter referred to as Commission) erred in affirming the action of the Police Commissioner in dismissing appellant from his position as policeman in the Police Department of the City of Philadelphia. The order of the Commission is as follows: ". . . we, therefore, sustain the dismissal and we so certify to the Personnel Director."

2. The Commission erred in making findings of fact, there being no evidence in the record to furnish a basis for those findings.

3. Assuming arguendo the findings of fact by the Commission were not in error, the Commission erred in determining that those facts were sufficient upon which to support the charge against the appellant of "conduct unbecoming an officer", such evidence being insufficient to support that charge as a matter of law.

4. The Commission erred in making findings of fact and conclusions based upon hypothesis and conjecture.

5. The Commission erred in making findings of fact and determinations based upon their conclusions as to certain facts of which there was no evidence in the record,

the Commission apparently drawing upon their own knowledge and belief.

6. The Commission abused its discretion and was capricious in finding as a fact, in the face of overwhelming evidence, that the appellant was aware that Leo Coleman was synonymous with the allegedly notorious "Clee" Coleman.

7. The Commission was procedurally incorrect in permitting the Assistant City Solicitor to inflame their judgment by referring to the arrest and conviction of "Clee" Coleman in the face of the fact that the appellant was unaware of the dual identity of Coleman, his original mortgagee.

8. The Commission committed a basic error in procedure by permitting the Assistant City Solicitor to attempt to prove his charges by calling the appellant as his witness over the objections of appellant's counsel.

9. The Commission was guilty of an abuse of discretion in its finding that the appellant knew Leo Coleman as a "notorious number banker" in the appellant's police district.

10. The Commission erred, as a matter of law, in deciding that a police officer may be dismissed for "gross stupidity".

11. The Commission committed a basic error in deciding that a loan, not matter how generous, that has been and is being painstakingly repaid with interest, is an event of such a suspicious nature as to require investigation by a scrupulously honest police officer.

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